

Redundancy and Business Change

1. Overview

- 1.1. A redundancy situation arises when an employer no longer requires the role an employee is carrying out, because the organisation's requirements have changed.
- 1.2. As with any other termination of employment, making an employee redundant means that the employee can choose to take a personal grievance claim if they feel the dismissal due to redundancy was unfair.
- 1.3. Both the reason for the redundancy, and the process followed, must be fair and reasonable. If the employer needs to select between a number of staff, the selection process must also be fair and reasonable. Redeployment and other options must be considered before terminating employment. Notice must be given, the employer should do what they can to assist the employee, and compensation may need to be paid.
- 1.4. Redundancy also arises when an employer sells or transfers their business, and there are requirements around this type of redundancy.
- 1.5. Sometimes an employer wants to make a change which falls short of termination of employment – such as reducing the hours or changing the tasks the employee does. There are requirements around how such change is managed – the employer does not have the right to change the employee's role without the employee's agreement.
- 1.6. Employment agreements generally contain provisions about redundancy, and they can vary considerably. It is always essential to check the specific provisions in the employment agreement.

2. Genuine Reason

- 2.1. Redundancy situations tend to arise either because the organisation is changing how it does things, or it needs to make changes because the current way of working isn't sustainable. A genuine redundancy situation may occur because the employer is losing money and needs to make cuts in its costs, because the work the employee is doing is no longer needed or because there is a more efficient way of organising the business.
- 2.2. For a dismissal due to redundancy to be justifiable, there must be a very good reason. The reason must relate to the employer's business – not the employee's performance or conduct. It does sometimes happen that a genuine business need

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and a performance or conduct issue can overlap, and the employer needs to make a decision as to which is the most appropriate path to take. It may help to consider whether, if the employee resigned tomorrow, you would replace them or not. If the answer is yes, this is probably a conduct or performance issue. If the answer is no, this is probably a redundancy situation.

- 2.3. It is never a good idea to try to fix a performance problem with a redundancy process. It's not good faith behaviour, it limits how the employer can move forward once the employee has gone, employees tend to see through it and feel that you are being dishonest with them, and if an employee takes a personal grievance, and the Employment Relations Authority reaches the conclusion that the redundancy was a sham, the employee may be reinstated and awarded lost wages and compensation.
- 2.4. Careful consideration should be given to the reason. Why has this happened? Is there another solution rather than redundancy? Can you explain the reason clearly? Can you provide information which backs up your conclusion? Have you carried out a review? Do you have a good understanding of why you are in this position?
- 2.5. It is important to ensure that any information relied upon, including financial information, is carefully checked and verified. Dismissals based on financial information which was later found to be not accurate have been held to be unjustified dismissals. It is essential to double check and verify any information that will be relied on to justify redundancy. If cost cutting is the reason, or part of the reason, for considering redundancy, the employer should be able to explain what other options have been implemented, and considered, to save costs, what savings were achieved, and why those savings were insufficient. Redundancy should be a "last resort".
- 2.6. Before commencing any redundancy process, the employment agreement should be checked. Employment agreements often set down requirements for consultation, notice, compensation and selection of affected employees. The employer must ensure they comply with the employment agreement as well as following the principles outlined in this document.

3. Process

- 3.1. The Employment Relations Act requires employers to consult with staff, and unions where the employees are union members, before making any decisions which could impact on employees. This includes redundancy situations, but it also includes other situations which could result in change for the employees – such as changing hours, changing what employees do, and so forth.
- 3.2. Consultation means telling the staff and union what you are considering and why, providing them with the relevant information and justification, giving them time to

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consider this and provide feedback, and not making any decisions until you have considered any feedback provided.

- 3.3. When should consultation take place? Consultation needs to take place before decisions are made. This means you need to think through the implications of a decision as to whether it could have impacts on employees. If so, you will need to consult before the decision is made. For example, if the Board makes a decision to sell the business, such a decision should not be made until consultation has taken place. Instead, if the Board reaches a conclusion that they want to look at selling the business, the decision that should be taken is to consult with the employees about a proposal to explore selling the business.
- 3.4. Sometimes an employer will carry out a review before forming a view about what the way forward might be. Such a review will often involve input from employees. It's important that employees understand the implications of the review when they are providing input. Having input into a review is not the same as being consulted about a specific proposal. If the employer carries out a review, and then decides they want to follow a particular course of action, the employer will then need to consult about the course of action they would like to follow.
- 3.5. It is important to be able to show that fair consultation has taken place, and it is important to make sure employees have all the facts. For these reasons, the best approach is normally to put together a written proposal, to talk through this proposal with the employees, and then allow time for the employees to consider this and provide feedback.
- 3.6. The proposal should set out:
 - The background – what the problem is that the employer is trying to solve, and how it has arisen
 - Relevant information about the background – this might be financial accounts, statistics about sales or patient numbers or hours or other information
 - Other options that have been considered or tried, and why they haven't solved or won't solve the problem
 - What the employer is proposing to do
 - What the implications of this proposal will be for the employee, if it proceeds
 - The fact that no decisions have been made
 - A request for feedback from the employee
 - A timeframe for feedback to be provided
 - How feedback should be provided
 - A statement that no decisions will be made until the feedback has been considered
 - An indication of when decisions are likely to be made
 - How the employee can request further information

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- A statement that the employee may seek advice and may choose to provide feedback through their representative
 - A statement about support available to the employee (e.g. EAP, counselling)
- 3.7. A draft proposal format is attached as Appendix A.
 - 3.8. Relevant supporting information should be provided.
 - 3.9. Where union members are involved, the employer should provide the proposal to the union/s. Employers often give the union organiser an early confidential heads up that a proposal is coming so that the union official can be available to support the employees.
 - 3.10. Rather than sending the proposal to the employee/s without warning, the employee/s potentially affected should be asked to attend a meeting to discuss a proposal for change. The proposal should be talked through and then provided in writing. Employees are likely to be shocked and upset and will not remember everything that is said at a meeting, so the written proposal gives them the information to take away and consider.
 - 3.11. How long should be allowed for feedback? Two weeks is often suggested as this gives the employee time to process shock, anger and sadness, before they start considering the practical implications of what is proposed. Sometimes where the proposal is straightforward and expected, or urgent, a lesser time period may be used. If the proposal is particularly complex, a longer time period may be appropriate.
 - 3.12. An extension to the time period is sometimes requested. Whether this can and should be agreed to will depend on how complex the restructuring is and how urgent the change is. It is recommended that an extension is agreed if there is good reason for seeking more time, and extra time can be allowed.
 - 3.13. Further information should be provided on request through the consultation period. If there are a number of questions and the restructure impacts a number of staff, it may be worthwhile providing a summary of further information provided or FAQs document providing the questions and answers for everyone.
 - 3.14. Once the period for feedback is complete, the employer will need to consider the feedback received before making a final decision.
 - 3.15. Sometimes the feedback suggests a different approach than the employer originally proposed. If this occurs, it is often necessary to consult again about the new proposal.
 - 3.16. Once the feedback has been considered, the employer should provide a response to the feedback received, and a final decision. The final decision should be

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confirmed in writing, and it is good practice to acknowledge and respond to the feedback at the same time.

3.17. A draft decision letter is attached as Appendix B.

4. Selection

- 4.1. Often a redundancy decision means selecting who will be impacted. As with the decision to reduce numbers, the decision about who will be affected has to be fair, and unless the employment agreement sets down how selection will be done, the employees and union will need to be consulted about how the employer proposes to select.
- 4.2. Consultation about selection can either take place at the same time as consultation about the proposal for change, or it can occur separately after the decision to change has been made. Employers generally consult about both aspects at the same time, as otherwise the process can be quite protracted.
- 4.3. Consultation about selection involves explaining how you propose to select the employees, and asking the employees to provide feedback about this.
- 4.4. There are a number of options as to how you might select. Unions often propose “last on, first off” which means the longer serving employees are retained. This obviously recognises service but may not always result in the highest skilled or best performing employees being retained.
- 4.5. Unions also often suggest voluntary redundancy – which means that employees can volunteer to take redundancy if this suits their circumstances. Again, this may not always result in keeping the highest skilled or best performing employees. It is recommended that employers do not agree to anything more than considering applications for voluntary redundancy and make it clear that all, or any, applications will not necessarily be accepted.
- 4.6. Employers frequently choose to use a selection matrix. Essentially, the employer lists the key attributes that they want to retain, which may be weighted for importance, and then measures and scores each employee in the selection pool against those attributes. The attributes used may include anything from qualifications to service to attendance to performance, but any attribute must be measurable, and contentious or vague attributes should be avoided. Once the scores are added up, the lowest scoring employees would be the ones considered for redundancy.
- 4.7. If this sort of approach is used, the employer should provide the results of the scoring process to the employees affected and give them the opportunity to comment before the scoring is finalised. This means that each employee is given what they scored on each attribute, and where this put them in the ranking (for example, that they were ranked three out of six) as well as what the implication

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would be for them (retained, or made redundant). The employee should be given a couple of days to provide feedback before the scores are finalised.

- 4.8. When deciding how employees will be selected, the employer should remember that this will have implications not just for the current decision, but for future selection processes – as what the employer did last time will tend to set a precedent for the future.

5. Redeployment

- 5.1. Where a change is implemented which disestablishes an employee's position, the employer must consider whether it is possible to redeploy that employee. Redeployment opportunities may arise from the restructure itself, or may arise within the organisation. Case law has established that redundancy should be a last resort, and if an employee can be redeployed into another role, that should occur. This means that an employee who is being disestablished wouldn't need to be the "best person" for another role or to be more experienced than external applicants, but would need to be capable of carrying out the role efficiently - some training might be required.
- 5.2. The best approach is to advise an employee whose position is being disestablished of all vacant roles within the organisation, without any attempt to edit for suitability, and to explain that there has been no editing for suitability. The employee can be asked to indicate if they are interested in any vacant roles. This does not mean, of course, that redeployment has to be considered for a role the employee cannot fulfil.
- 5.3. If there is an option for redeployment which is clearly suitable for the employee (for example, the skills are clearly within their capacity and the terms and conditions, remuneration, hours and location are the same or advantageous) an employee who declines such a role probably won't qualify for redundancy compensation.
- 5.4. An employee who declines a redeployment option which is clearly not suitable for the employee or has dissimilar terms and conditions is likely to still qualify for redundancy compensation. The employment agreement should set out conditions around the payment of redundancy compensation.
- 5.5. Sometimes an employee will indicate an interest in redeployment to a role which is quite different. The role may have different or lesser hours, the remuneration may be quite different, or the proposed new role may not use the employee's qualifications or experience. Where there is a reduction in hours or remuneration, there may be agreement that the employee will receive partial redundancy compensation – that is, the employee receives compensation for the part of the role they have lost on a pro rata basis.

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- 5.6. As always, in any discussions about redeployment or other options the employee should have the option of bringing a representative or support person.

6. Notice

- 6.1. Notice is normally set by the employment agreement covering the employee. There may or may not be different notice periods for general termination and for redundancy. As always, notice should be given in writing. If the employer wishes to pay in lieu of notice, this can be done provided the employment agreement allows for it. "Garden leave", where the employee remains employed but is not required to attend and carry out work, can be utilised by agreement. Generally the best practice is to offer the employee the option of payment in lieu or notice or garden leave rather than imposing it – an agreed solution is always the best option.
- 6.2. Case law has held that an employee being made redundant is entitled to a "dignified exit". This means that the employee should not be hustled off the premises with their belongings sent on immediately. The employee should normally have time to tie up loose ends, complete and hand over their work, have a farewell with their colleagues, say goodbye to clients and so forth.

7. Compensation

- 7.1. Redundancy compensation may be set by the employment agreement. If so, it will need to be paid in accordance with the agreement. Redundancy compensation may be a flat rate, or it may be a formula based on service.
- 7.2. Redundancy compensation is not usually payable in the following circumstances:
- Where the employee has been offered redeployment into a suitable alternative position (with the same or overall no less favourable terms and conditions, with their service recognised, in a role within their capabilities, in a reasonable location) – whether or not the employee has accepted the offer
 - Where the employee has accepted redeployment into any position (sometimes partial redundancy compensation may be payable if the hours or pay are less)
 - Where the employee's work is being taken over by a new employer, due to a sale of the business or contracting out, and the new employer has offered redeployment (with the same or overall no less favourable terms and conditions, with their service recognised) – whether or not the employee has accepted the offer

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- 7.3. While these are common provisions, employment agreement provisions can differ, and the employer must provide at least what the employee's employment agreement sets out.

8. Assistance

- 8.1. Being made redundant can be a shock and a disheartening and stressful experience. Employees may feel anxious, helpless or depressed. Employers should consider what assistance can be provided to affected employees. Assistance may include EAP/counselling, job search skills such as CV drafting or interview skills, outplacement services, acting as a referee, time off for job search, budgeting assistance, help with seeking income support, checking with other employers about potential vacancies – there are many forms of assistance which can be helpful. Assistance provided will need to be within the employer's ability to pay and/or capacity, but case law has noted that employers should provide reasonable assistance to help the employee with the transition.
- 8.2. The employment agreement may specify that certain forms of assistance will be provided by the employer. If so, this will need to be provided as a minimum.

9. Sale, Transfer and Technical Redundancy

- 9.1. Redundancy can arise through a sale or transfer of part or all of the business, or through contracting out part of the business. In this case, the work being done by the employee will often still be done – but it will be under the control of a different employer.
- 9.2. The Employment Relations Act has some specific provisions about this sort of "restructuring" which need to be complied with. There are specific requirements for some categories of employees who are considered vulnerable, including cleaners, catering staff, security staff and specified staff in education, hospitals, aged residential care. These employees are entitled to elect to transfer to the new employer on the same terms and conditions of employment and with their service treated as continuous. The original employer must also transfer payment for annual holidays and alternative holidays and must provide employment information. The original employer provides, by law, an implied warranty to the new employer that the original employer has not changed the work, employees doing the work or terms and conditions of the employees doing the work. If the new employer makes a transferring employee redundant, the employee will be entitled to redundancy compensation.
- 9.3. In the case of other employees, the employee's employment agreement must contain an Employee Protection Provision (which sets out a process to follow in negotiating with the new employer about whether the new employer will offer the

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employees employment). The employer must follow the requirements in the employment agreement, including the Employee Protection Provision.

- 9.4. In many sale and transfer situations, the new employer agrees to take on the employees on their current terms and conditions and with their service with the original employer recognised. In this case, the employee won't normally be entitled to redundancy compensation, unless the employment agreement provides that they are. The original employer must still meet the other requirements such as consultation and notice.
- 9.5. While the new employer can offer the employee a job, the employee is not obliged to take it – an employee isn't a chattel that can be "sold". Usually, however, the employee won't be entitled to redundancy compensation if they reject an offer of employment with the new employer.
- 9.6. Where the new employer is not prepared to offer the employees employment, the original employer remains responsible for treating them fairly, including consultation, notice, considering redeployment, and redundancy compensation where this is provided for in the employment agreement.
- 9.7. The Employee Protection Provision will require the original employer to take steps to negotiate the new employer taking on the staff. It is not enough to simply accept a purchaser saying they don't wish to employ the staff.
- 9.8. "Technical redundancy" describes the situation when an employee is technically redundant from the original employer but has been offered their position with the new employer. As noted above, redundancy compensation is not usually payable in this situation – but the employment agreement may provide otherwise.

10. Managing Change

- 10.1. Not all change will result in terminating employment. Sometimes an employer wants to change what work employees will do, what hours they will work, or where they will work. Job descriptions may allow for some adjustments to the work an employee does, but otherwise these changes can't just be made unilaterally.
- 10.2. When an employer wants to make this sort of change, there are two potential paths. The first is that the change can be agreed between the employer and employee. Where this happens, the change should be recorded in the employment agreement or job description. Any change to an employment agreement needs to be signed by both parties.
- 10.3. The other path is to commence a restructuring process. As with a change that may result in termination of employment, there will need to be consultation about a specific proposal, and the employer will need to provide the proposal and the

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relevant information, allow time for feedback, consider the feedback and communicate the final decision.

- 10.4. Employers do not have a right to reduce, or increase, the number of hours a permanent or fixed term employee works, unless the employee agrees to the change. This means that if the employee has not agreed to such a change, the employer will need to propose to disestablish the current role the employee holds, and to establish a new role with the number of hours the employer wishes to have. The employee cannot be forced to agree to a reduction or increase in hours, and the employee cannot be forced to take redeployment into a role with different hours. However, an employer can choose to disestablish a role with certain hours and to establish a new role with different hours.
- 10.5. As with any other restructuring, there will need to be a genuine reason for the change and a proper process needs to be followed.
- 10.6. Similarly, employees cannot be forced into working fundamentally different roles, or to working in very inconvenient locations. An employer can reasonably relocate within a city or area, but they cannot expect employees to move to a different city or undertake an unreasonable commute. What is reasonable will depend on how far away the new location is, where the employee lives in relation to both, and how the employee travels to work.
- 10.7. Where there will be significant change, even if it doesn't affect terms and conditions of employment, it is always good practice to consult with the staff (and union/s, where staff are union members) first. This has several practical advantages. The employees will feel included and valued. The employees may well see some implications the employer has not, or a better alternative. And if the change subsequently means unforeseen changes to jobs or hours needing to be considered, the employees will have had some opportunity to influence the decisions which led to that situation.

[Need more help?](#)

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APPENDIX A

DRAFT PROPOSAL FORMAT

Introduction

Introductory statement. For example:

This document confirms our advice at today's meeting that we are proposing to make changes to the organisation. It sets out the background and the detail about our proposal to restructure, and requests your feedback on this proposal before we make any decisions.

Background

Set out the problem you are seeking to resolve in detail. Include the history and how the problem has arisen.

Refer to the information you have attached such as financial accounts, statistics etc.

Set out the other options that have been tried, and why they haven't solved the problem.

Set out other options you have considered, and why you have not gone ahead with them.

Proposal

Clearly state what you are proposing to do, and what the implications are for the employee/s. If your proposal is to reduce staffing numbers, you should also refer to how you propose to select the affected staff, unless the employment agreement states how staff must be selected for redundancy.

For example:

Our proposal is that [explain proposal; refer to proposed job descriptions, rosters etc if relevant].

If this proposal proceeded, this would mean [set out implications for employee/s].

We want to emphasise that this is a proposal only. No decisions have been made.

Consultation about proposal

Request feedback, state that no decisions have been made, and explain timeframe and how feedback should be provided. State that further information can be requested.

For example:

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We would like to give staff and the union the opportunity to provide feedback on this proposal. Your feedback might include alternatives to the proposal which you believe would be viable, and/or your thoughts about the proposal and its impact on you. You can provide feedback individually or as a group.

No decisions have been made at this stage, and we will carefully consider all feedback before making any decisions.

Feedback should be provided by *[time and date]*. Your feedback should be provided in writing. It is likely that we will make a decision by *[date for decision]*.

Please let us know if you would like any further information about the proposal or have any questions.

You are of course entitled to seek advice and assistance and you may choose to provide feedback through your union or representative.

Support

Note that support will be provided where necessary and specify any support available such as EAP or counselling.

For example:

We know you may be feeling shocked, concerned or both. We would like to encourage staff to seek support as you need to as we work through this process. EAP is available for staff who wishes to seek assistance; we will pay for up to two sessions for any staff member potentially affected by the proposal. EAP can be accessed at *[details]*.

We know this will be a difficult time for potentially affected staff and we regret the need to be considering this proposal. We want to emphasise this is no reflection on staff performance or commitment – the factors causing this are outside of the control of staff.

Please let us know if there is any other support we can assist with.

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APPENDIX B

DRAFT DECISION LETTER

Dear

This letter is to confirm our advice at today's meeting about the outcome of our proposal to *[summarise proposal]*.

As you know, we met with you on *[date]* to discuss a proposal to *[proposal details]* and to seek your feedback. Feedback closed on *[feedback date]*. *[If the feedback resulted in a change to the proposal being consulted about, set out what the alternative proposal was and the consultation process followed about the alternative also]*

We received some feedback about this proposal. *[State each piece of feedback and response to it. If an alternative was proposed, explain your view as to whether the alternative is feasible or not, and if not, why not]*

We have carefully considered the feedback. We have concluded *[set out your decision and the implications of the decision. If the decision means a position or positions will be disestablished, your letter should state your regret for this, the fact that it was in no way the fault of the employee/s involved, and set out support and assistance available.]*

The next steps will be *[set out next steps – e.g. individual meeting with each affected staff member, redeployment options, selection processes etc]*

Yours etc

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